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## Note

### Can Government Buy Everything?: The Takings Clause and the Erosion of the “Public Use” Requirement

Jennifer J. Kruckeberg\*

Whether you know it or not, your house is for sale. Corporations, using cities as their personal real estate agents, are proposing the following assignment: “Find me your most prominent location, get rid of what is on it, help me pay for it, and maybe you will be lucky enough to have me move to your city.” Such is the state of the current eminent domain power. The Fifth Amendment authorizes the government to take private property for “public use” if just compensation is paid.<sup>1</sup> The modern framework, however, extends beyond any power contemplated by the Framers of the Constitution.<sup>2</sup> In fact, “as urban densities increase and inner-city redevelopment opportunities become more limited, there will be increasing temptations for public agencies to use their power on behalf of select private interests.”<sup>3</sup>

The government’s power to exercise this threat has expanded considerably.<sup>4</sup> Courts used to construe the “public use” limitation strictly, meaning a taking could not occur if the new use was not accessible to the general public.<sup>5</sup> Over time, courts increasingly construed public use to be synonymous with public purpose, opening the door to a broad range of takings for private interests.<sup>6</sup> The justification of public benefit resulting in higher tax revenue for public coffers now suffices.<sup>7</sup>

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1. See U.S. CONST. amend V.
2. See *infra* notes 21, 164 and accompanying text.
3. Editorial, *Courts and Condemnation*, DENVER POST, July 27, 2001, at B8.
4. See *infra* notes 15-21 and accompanying text.
5. See *infra* notes 15-17 and accompanying text.
6. See *infra* notes 34-54 and accompanying text.
7. See *infra* notes 18-20 and accompanying text.

This Note will demonstrate that the modern public use doctrine is badly flawed. The Minnesota Court of Appeals exemplified the problem by validating the City of Richfield's condemnation of homes and businesses at a prime intersection to pave the way for the Best Buy corporate headquarters.<sup>8</sup> Part I of this Note traces the origins of eminent domain, the evolution of the "public use" language of the Takings Clause, and the definitions of the term "blight" that describes conditions often used as justifications to condemn private property. Part II examines the changing face of federal and state court applications of the public use doctrine, highlighting the Minnesota model. Part II ends with a comparison of the levels of scrutiny courts exercise to review condemnation proceedings. Part III discusses proposals designed to ameliorate the damage that the current broad application of public use inflicts on the concept of private property. This Note concludes that implementation of the proposed solutions is imperative to fill what has become a gaping loophole in private property rights under the Constitution.

## I. EMINENT DOMAIN AND THE PUBLIC USE REQUIREMENT

### A. ORIGINS OF THE GOVERNMENT'S EMINENT DOMAIN POWER

"Eminent domain" is the government's power to take private property without the owner's consent; this power is limited by the condition that such property must "be taken for public use" and not "without just compensation."<sup>9</sup> Eminent domain existed in the common law prior to the adoption of the Takings Clause of the Constitution.<sup>10</sup>

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8. See *Housing & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 885 (Minn. 2002).

9. U.S. CONST. amend. V. Most state constitutions have similar provisions. See, e.g., COLO. CONST. art. II, § 15; HAW. CONST. art. I, § 20; IL. CONST. art. I, § 15; KY. CONST. § 13; MICH. CONST. art. X, § 2; MINN. CONST. art. I, § 13; MONT. CONST. art. II, § 29.

10. See *Kohl v. United States*, 91 U.S. 367, 372 (1875) (noting that the government's eminent domain power was recognized at the time of the ratification of the Constitution); Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 53 (1999) (referencing the English legislative practice and natural law tradition); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 555 (1972) (explaining that many eminent domain principles developed from judge-made law).

## B. APPLICATION OF THE TAKING CLAUSE'S TERM "PUBLIC USE"

Although the power of eminent domain existed in English common law, the English tradition did not contain a "public use" requirement.<sup>11</sup> Without guidance from common law precedent, the "public use" phrase in the U.S. Constitution lacks historical application and does not expressly define the meaning or the reasoning behind inclusion of the phrase.<sup>12</sup> Legal scholars repeatedly fail to find evidence articulating what the Framers wanted the public use language to require.<sup>13</sup>

To resolve this ambiguity, the Supreme Court integrated its interpretation of the public use requirement into the eminent domain power.<sup>14</sup> Traditionally, the power to acquire private land for parks, sewer systems, highways and roads, or hospitals for communal access by the general public was accepted to be necessary for an evolving society.<sup>15</sup> The broad extension of the public use requirement through case law to incorporate private economic redevelopment projects causes debate over the scope of this power.<sup>16</sup> This debate may be inevitable because state statutes now validate eminent domain under the guise of public use for takings that were previously prohibited under the strict interpretation of public use.<sup>17</sup> Under the modern view, the public use language of the Takings Clause requires only that the public derive some conceivable benefit from the taking.<sup>18</sup> The public does not have to have

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11. See Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking"—A Proposal to Redefine "Public Use,"* LAW REV. MICH. ST. U. DETROIT C.L. 639, 644 (2000) (citing Stoeck, *supra* note 10, at 565). The elements of the power of eminent domain at English common law were comprised of "(1) an act of Parliament that (2) authorized a *compulsory* taking of an estate in land." *Id.* (emphasis added).

12. *Id.*

13. See Kulick, *supra* note 11, at 644; Stoeck, *supra* note 10, at 591.

14. See *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 416-17 (1896) (holding that the taking of railroad land for a grain elevator was not a sufficient public use to be valid).

15. See, e.g., 2A NICHOLS ON EMINENT DOMAIN § 7.02[3] (Julius L. Sackman ed., 3d ed. 1998) (noting that eminent domain actions which enlarge public resources constitute a valid use).

16. See *infra* note 27 and accompanying text.

17. See NICHOLS ON EMINENT DOMAIN, *supra* note 15, § 7.03[10][b].

18. See James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1278 (1985) (emphasizing the limitlessness of the definition of potential benefits by stating that "[p]ublic use' has . . . been defined so broadly that little if anything will not fall within the meaning of the term").

actual access to the acquired property.<sup>19</sup> The narrow requirement that a taking must strictly be for literal use by the public has largely been abandoned.<sup>20</sup> Legal commentators now use the terms public use and public purpose interchangeably.<sup>21</sup>

### C. ASSESSING BLIGHT AS A JUSTIFICATION FOR PUBLIC USE CONDEMNATIONS

The removal of blight is a primary example of what government entities consider a public purpose.<sup>22</sup> Consequently, many condemning authorities justify a taking by defining the area as “blighted.”<sup>23</sup> Blight is generally defined as “the state of being a slum, a breeding ground for crime, disease, and

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19. See *id.* at 1280.

20. See Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978) (noting that the broad view of public use has returned to favor).

21. See, e.g., Kulick, *supra* note 11, at 641 (exhibiting the similarity of the terms by describing them together as “the public use finding, or the public purpose that the government offers in order to condemn property under the Constitution”).

Other legal commentators dispute the legitimacy of substituting public purpose for the term “public use” under the Constitution. For example, Roger Clegg, *Reclaiming the Text of the Takings Clause*, in REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 7, 17 (1994), stated,

The phrase “for public use” has been commonly misinterpreted in two respects: first, the Clause as a whole has been read as an affirmative prohibition of all takings (whether or not compensated) *not* for public use; and, second, it has been read to mean “for legitimate public purpose,” so that there is no longer any “use” requirement.

*Id.* The author further distinguished the two terms:

The word “use” is and was distinct from the word “purpose,” and there is no reason to suppose that the Framers used the former when they meant the latter. . . . “Use” has had a much different—and narrow and more specific—meaning than general purpose, rationale, or reason for hundreds of years. . . . In sum, [use] means employing with a purpose; it does not mean purpose.

*Id.* at 18.

22. See Gideon Kanner, *That Was the Year That Was: Recent Developments in Eminent Domain Law*, 87, 89-92 (A.L.I.-A.B.A. Course of Study, Aug. 17-19, 2000), WL SF08 ALI-ABA 87 (“[A] determination of blight is also a determination that the constitutional criterion of ‘public use’ has been met.”).

23. See, e.g., *Friends of Mammoth v. Town of Mammoth Lakes Redev. Agency*, 98 Cal. Rptr. 2d 334, 359 (Cal. Ct. App. 2000) (holding the city’s findings of blight were based on a disingenuous statistical analysis that defined an area as blighted when fewer than two percent of the buildings were actually unsafe or unhealthy); *Beach-Courchesne v. City of Diamond Bar*, 95 Cal. Rptr. 2d 265, 272-76 (Cal. Ct. App. 2000) (finding that a city’s undefined claims of blight in an affluent community were not supported by evidence).

unhealthful living conditions.”<sup>24</sup> In the past few decades, cooperation between federal, state, and local governments and private corporations resulted in the redevelopment of many derelict areas.<sup>25</sup> Cities across the nation rebuilt their downtown areas by demolishing public housing developments to make way for industrial areas or newer, upscale rental buildings.<sup>26</sup> The clearing of large parcels of land for these redevelopment schemes, aided by significant financial assistance from the federal government, is controversial.<sup>27</sup> These projects often eliminate seemingly satisfactory properties along with those that are indisputably blighted.<sup>28</sup>

Most states have statutory provisions that define blight.<sup>29</sup>

24. R. Bruce Tepper, *A Thousand Points of Blight: Redevelopment Agencies Are on Notice That Continued Misuse of Their Powers Could Endanger the Future of All Redevelopment Programs*, L.A. LAWYER, Mar. 2001, at 34 (2001) (quoting Hudson Hayes Luce, Note, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TR. J. 389, 393 (2000)).

25. See 1 AM. JUR. 2D *Proof of Facts* 401 §1 (1974).

26. See Keasha Broussard, *Social Consequences of Eminent Domain: Urban Revitalization Against the Backdrop of the Takings Clause*, 24 LAW & PSYCHOL. REV. 99, 107 (2000) (citing LAWRENCE M. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION* 148, 151-54 (1968); Pam Belluck, *Razing the Slums to Rescue the Residents*, N.Y. TIMES, Sept. 6, 1998, at A26).

27. See George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1008 (2001). Professor Gideon Kanner of Loyola Law School is a leading critic of eminent domain abuses that facilitate redevelopment. See, e.g., Gideon Kanner, *Scrutinizing 'Public' Use*, NAT'L. L.J., Apr. 22, 2002, at A21 (stating that in 1999 the National Law Journal “took an editorial position criticizing abuses of the eminent domain power that, in disregard of the Fifth Amendment’s ‘public use’ limitation, consisted of taking unoffending property and reconveying it to large profit-making corporations out to make a buck”). Lawrence Friedman also considered the psychological consequences of the condemnations, arguing that proponents of these clearance minded bulldozing projects also fail to adequately consider their social impact and effect on residents. FRIEDMAN, *supra* note 26, at 150-51.

28. See Tepper, *supra* note 24, at 36 (noting that redevelopment of non-blighted areas leads to higher service costs in such areas, which results in a loss of services to other areas).

29. See, e.g., MINN. STAT. § 469.002, subd. 11 (2001) that defines a “blighted area” as

any area with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light, and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.

For similar definitions by other states, see, for example, ALASKA STAT. §

Broad definitions can empower state legislatures to enact sweeping redevelopment schemes.<sup>30</sup> The language of these provisions typically characterize such areas as suffering from defective or inadequate layout, unsanitary or unsafe conditions, deterioration, improper subdivision, conditions that endanger life by fire or other causes, or any such combination of factors significantly impairing the growth of such an area, thereby constituting a threat to the public health, safety, morals, and welfare.<sup>31</sup>

To decide whether an area is blighted, courts generally rule in accordance with the determinations of local boards and construe the term broadly.<sup>32</sup> There are limits, however. Aside from most courts' tendencies to accept a redevelopment authority's findings, proof that the area contains criteria generally included in a checklist of blighted conditions is necessary.<sup>33</sup> While seemingly well intentioned, blight determinations are subjective and thus vulnerable to abuse. Because the elimination of blight is one of the most common ways municipalities justify a public purpose to condemn private land, the magnitude of that abuse is potentially large.

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18.55.950 (2000); COLO. REV. STAT. 31-25-103 (2001); FLA. STAT. ANN. § 163.340 (2000); GA. CODE ANN. § 8-4-3 (1997); HAW. REV. STAT. ANN. § 53-1 (2001); IND. CODE ANN. § 36-7-1-3 (1999); LA. REV. STAT. ANN. § 33:4625 (2002); MICH. COMP. LAWS ANN. § 125.72 (1997); N.D. CENT. CODE § 40-58-01.1 (2001); WIS. STAT. ANN. § 66.1331 (2001); WYO. STAT. ANN. § 15-9-103 (2001).

30. See 1 AM. JUR. 2D *Proof of Facts* 401 § 2 (1974).

31. See *id.* (citing a similar definition of blight employed in ARIZ. REV. STAT. § 36-1471(2)). This language is similar to the Minnesota statute defining blight in *supra* note 29. The rationale behind the alleviation of these conditions is that the areas have declining or stagnant tax revenues and demand increased services to fight crime and other health and safety problems. See *Tepper, supra* note 24, at 36.

32. See 1 AM. JUR. 2D *Proof of Facts* 401 § 3 (1974).

33. This proof usually requires evidence of one of the following:

Predominance of dilapidated, improperly maintained buildings;  
[i]ncompatible mixture of residential and nonresidential buildings;  
[i]nadequacy of streets; [l]arge number of irregularly shaped lots;  
[o]vercrowding of buildings on parcels; [p]resence of fire and rescue hazards; [d]isproportionate number of fire calls; [d]isproportionate number of arrests; [d]isproportionate number of persons receiving public assistance; [d]isproportionate rate of disease; unusual conditions of title.

*Id.* § 5.

## II. TAKINGS OF PRIVATE LAND TO BENEFIT OTHER PRIVATE PARTIES AND THE MODERN PUBLIC USE CLAUSE

### A. THE U.S. SUPREME COURT'S INTERPRETATION OF PUBLIC USE

In the early twentieth century, the public use language in the Fifth Amendment substantiated the widespread conviction that condemnation authority to take private land required a literal use for the public.<sup>34</sup> Consistent with this belief, in some early takings challenges involving disputes over the public use requirement, the Supreme Court held that the judiciary should make the ultimate determination whether to construe a use as public or private.<sup>35</sup> Interestingly, in other early decisions, the Court made contradictory statements expressing that the authority to make the determination was properly left to the legislature.<sup>36</sup> Nonetheless, the Court established that a taking, via the authority of a municipality providing the property owner with just compensation, is unconstitutional if it is for a purely private function.<sup>37</sup>

Following these initial limitations on the public use doctrine, the Supreme Court's next ruling paved the way for broad discretion by cities to construe urban and regional planning initiatives to be public uses. The Court's decision in *Berman v. Parker*<sup>38</sup> set a broad standard for courts to give

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34. Examples included roads, parks, and dams. See RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY* 331 (1996).

35. See *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930); see also *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (allowing the Court to overturn the legislative determination and concluding that the taking in question only benefited a private owner). The Court added that the condemnation was invalid because "[t]he taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." *Id.*

36. See *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 709 (1923) ("That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion."); *Bragg v. Weaver*, 251 U.S. 57, 58 (1919) ("Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate.").

37. See *Missouri Pac. Ry. Co.*, 164 U.S. at 417.

38. 348 U.S. 26 (1954).



deference to any and all conceptions of public use designated by municipalities.<sup>39</sup> The issue was whether private land in an economically depressed area could be transferred to a private party for redevelopment.<sup>40</sup> Congressional legislation allowed private developers to acquire private land pursuant to a plan for development.<sup>41</sup> The Court held that the government's power of eminent domain allowed it to transfer private property to another private party to develop the derelict area.<sup>42</sup> Further, the Court established that the legislature's definition of public use deserves judicial deference.<sup>43</sup>

This holding resulted in a lenient standard easy for municipalities to meet.<sup>44</sup> For state governments, the objectives within the scope of public use include benefits to the health, safety, and welfare of citizens.<sup>45</sup> For the federal government, the test simply requires a rational relationship to any of its enumerated or implied powers.<sup>46</sup> Some commentators argue that the Court's holding in *Berman* abandoned any restriction on the definition of public use conceivably derived from the term's inclusion in the Constitution.<sup>47</sup>

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39. See Mark C. Landry, *The Public Use Requirement in Eminent Domain—A Requiem*, 60 TUL. L. REV. 419, 426 (1985) (asserting that “[t]he 1954 case of *Berman v. Parker* signaled a further decline in the significance of the public use doctrine”). Further, George Skouras extended the significance of *Berman* stating that “the Supreme Court has read this [public use] clause out of the Constitution.” GEORGE SKOURAS, *TAKINGS LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE’S ACQUISITION, USE AND CONTROL OF PRIVATE PROPERTY* 44 (1998).

40. *Berman*, 348 U.S. at 31.

41. *Id.* at 28-29.

42. *Id.* at 32-34.

43. *Id.* at 33. This decision resolved the Court's earlier conflicting statements on the matter. See *supra* notes 35-36 and accompanying text.

44. The ease in meeting this standard derives from the acceptance of economic revitalization as a public use, rather than the prior requirement of a literal use by the public, and the deference given to legislatures to determine what are sufficient public uses. Kulick, *supra* note 11, at 651.

45. Lara Womack, *Private Property and the Power of Eminent Domain*, 28 REAL EST. L.J. 307, 312 (2000).

46. See RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 15.11, at 482 (2d ed. 1992).

47. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 161 (1985) (stating that “[t]he Supreme Court gave the [public use] limitation a mortal blow in *Berman v. Parker* when it noted that ‘the concept of the public welfare is broad and inclusive’ enough to allow the use of the eminent domain power to achieve any end otherwise within the authority of Congress” (quoting *Berman*, 348 U.S. at 33)); SKOURAS,

The Court's ruling three decades later in *Hawaii Housing Authority v. Midkiff*<sup>48</sup> further expanded the interpretation of public use.<sup>49</sup> At issue was the constitutionality of the Hawaiian legislature's determination that land could be transferred from a lessor to a lessee through the government's power of eminent domain to diversify ownership of land.<sup>50</sup> The Court held that the ownership of nearly half the State's land by only seventy-two individuals justified such a transfer under the Takings Clause.<sup>51</sup> Realigning the skewed real estate market constituted a legitimate public purpose that met the rational relationship test.<sup>52</sup>

The *Midkiff* ruling invited cursory judicial review of state legislatures' public use designations, rationalizing the confiscation of private land by the government for private development.<sup>53</sup> The rational basis test is not only easily met, but under this measure it is almost impossible that any public purpose endorsed by the legislature will not be upheld under the arbitrary and capricious standard.<sup>54</sup>

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*supra* note 39, at 44; Landry, *supra* note 39, at 426.

There is some limitation on the public use doctrine of the eminent domain power that remains relatively undisturbed in the United States. The government generally may not use its eminent domain power to take more land than is needed for a particular project for the sole purpose of later reselling it for a profit. See PLATT, *supra* note 34, at 331. While this practice, known as "excess condemnation" or "recoupment," has been used in Europe, notably with Baron Georges Haussmann's legendary rebuilding of Paris in the late nineteenth century, the United States generally rejects speculation in the land market to recover monies put into the adjoining land development as an inappropriate use of the eminent domain power. See *id.*; see also *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 543 S.E.2d 844, 847 (N.C. 2001) (noting that the practice of recoupment is "disfavored in American courts because it denies due process to landowners").

48. 467 U.S. 229 (1984).

49. See Kulick, *supra* note 11, at 651.

50. *Midkiff*, 467 U.S. at 231-32.

51. *Id.* at 232, 241-43.

52. *Id.* at 241-43. Despite the lenient holding, the Court did rebuke a taking solely for a private interest by stating that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Id.* at 245.

53. See Kulick, *supra* note 11, at 652 n.83 (citing *Midkiff*, 467 U.S. at 242).

54. See *id.* (arguing that the rational basis test invites creative legislating that merely provides the illusion that a taking has a public purpose).

1. *99 Cents Only Stores v. Lancaster Redevelopment Agency*:  
The First Federal Post-*Berman* Case to Reject a Condemnation  
as Inconsistent with Public Use

A decision by the United States District Court for the District of California marks the first time a federal court invalidated a municipality's public use justification in a condemnation proceeding since the lenient standards set by the Supreme Court in *Berman* and *Midkiff*.<sup>55</sup> In *99 Cents Only Stores v. Lancaster Redevelopment Agency*,<sup>56</sup> the issue was whether the city of Lancaster's proposal to allow retailer Costco to expand into adjacent retail space occupied by its competitor, 99 Cents Only Stores, constituted a valid public purpose.<sup>57</sup> Costco threatened to leave Lancaster, taking jobs and tax revenue with it if the eminent domain proceeding was not successful.<sup>58</sup> This created an economic incentive for the city to concede to Costco's demands.<sup>59</sup>

Unconvinced by the city's rationales, the court rejected the condemnation action as unconstitutional in violation of the Fifth Amendment.<sup>60</sup> Even though it used the relaxed rational relationship standard designated in *Midkiff*, the court nevertheless held that allowing Costco's expansion into the headquarters of its competitor under the guise of an alleged public purpose would strip the public use provision of the

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55. See Lefcoe, *supra* note 27, at 993 (recognizing that "[a]fter *Berman v. Parker*, federal courts have never rejected a condemnation of private property for want of a public use"); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 95-96 (1986) (conducting a study of the employment of public use and finding that all federal cases since 1954 found that a taking served a public use as well as 83.8% of all state appellate cases).

56. No. CV 00-07572 SVW, 2001 WL 811056 (C.D. Cal. June 26, 2001).

57. *Id.* at \*2-3.

58. *Id.* at \*2.

59. See *id.* at \*2. The removal of anchor tenants from so called "power centers" can be devastating to the viability of such ventures if a new tenant cannot be found for the site. See generally Raymond G. Truitt, *Fe Fi Fo Fum: Retail Giants Rule Power Centers*, PROB. & PROP., Mar.-Apr. 1996, at 38-42 (discussing the unique characteristics of this nascent form of retail development).

60. *99 Cents Only Stores*, 2001 WL 811056, at \*6. The court also held that the issue was not moot simply because Lancaster had withdrawn its condemnation proceeding against 99 Cents Only Stores. *Id.* at \*4. "It is well established . . . that a case is not rendered moot where, as here, a defendant voluntarily ceases the allegedly unlawful activity in response to a lawsuit but is otherwise free to return to it at any time." *Id.* at \*3 (citing *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir. 1994)).

Takings Clause of all meaning.<sup>61</sup> The court also rejected the city's contention that the threatened loss of Costco could cause future blight, holding that the argument was entirely speculative and an inadequate basis for a taking.<sup>62</sup> With this enterprising holding, the court in *99 Cents Only Stores* was the first federal court to set a boundary on legitimate motives allowed by the lenient rational basis standard for public use established in *Berman* and *Midkiff*.<sup>63</sup>

## 2. *Cottonwood Christian Center v. Cypress Redevelopment Agency*

Another California federal district court case bolstered *99 Cents Only Stores*'s invalidation of a taking for a private party under the guise of public use. In *Cottonwood Christian Center v. Cypress Redevelopment Agency*,<sup>64</sup> the court granted a church an injunction against the city of Cypress to prevent it from transferring the church's property to Costco for a retail store.<sup>65</sup> Remarkably, Costco was again the city's intended beneficiary.<sup>66</sup> While the church primarily argued it was the victim of land use

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61. See *id.* at \*5. While citing the "rationally related to a conceivable public purpose" language from *Midkiff*, the court also referred to the Supreme Court's pronouncement that an avowed public purpose is not acceptable if it is "palpably without reasonable foundation." *Id.* (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984)).

62. *Id.* at \*6. The purpose of the State of California's Community Redevelopment Law is to remedy existing blight, implying the inadequacy of a rationale based on the speculative elimination of potential future blight. See *id.* (citing *Friends of Mammoth v. Town of Mammoth Lakes Redev. Agency*, 98 Cal. Rptr. 2d 334, 362 (Cal. Ct. App. 2000); *Beach-Courchesne v. City of Diamond Bar*, 95 Cal. Rptr. 2d 265, 279 (Cal. Ct. App. 2000)).

63. Legal commentators cite this decision as a further indication that there may be a burgeoning change in judicial attitude away from the unlimited scope of the public use doctrine. See, e.g., Gideon Kanner, *The Development Score*, NATL. L.J., July 30, 2001, at A21 (listing a series of recent decisions limiting public use justifications as evidence of the change); Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, WALL ST. J., July 23, 2001, at B1 (noting that the presiding judge in *99 Cents Only Stores* wrote that "[t]he evidence is clear beyond dispute that Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer from one private party to another" and that "[s]uch conduct amounts to an unconstitutional taking purely for private purposes").

64. No. SACV0260DOCANX, 2002 WL 1827845 (C.D. Cal. Aug. 6, 2002).

65. *Id.* at \*1, 23.

66. See *id.* at \*6; see also Evan Halper, *Cities Grab Land for Revenue, But Judges are Slapping Their Hands*, L.A. TIMES, Aug. 24, 2002, at B8 (noting that in order to raise additional revenue through sales taxes, many cities are trying to draw big retailers such as Costco).

discrimination against religious organizations, prohibited by the First Amendment,<sup>67</sup> the court also based the granting of the injunction on its skepticism that the taking served a legitimate public purpose.<sup>68</sup> Noting the similarity between the scenario in *99 Cents Only Stores* and the instant case, the court asserted that both instances involved the “naked transfer of property from one private party to another.”<sup>69</sup> The court also emphasized that “[c]ourts must look beyond the government’s purported public use to determine whether that is the genuine reason or if it is merely pretext.”<sup>70</sup> When the city argued that the taking was justified because the land was blighted, the court dismissed the argument under the strict scrutiny review employed in First Amendment cases.<sup>71</sup> The court expressed doubt that the blight justification was a “genuinely-held purpose” and stated that it hardly seemed compelling.<sup>72</sup> The court’s skepticism of the city’s explanations provides support that courts are becoming increasingly critical of public use justifications.

Aside from this enterprising precedent, however, *Berman* and *Midkiff* have not been formally overruled or even limited. The resulting lenient treatment of the public use standard survives in federal courts. Dissension by lower federal courts, exhibited in *99 Cents Only Stores* and *Cottonwood Christian Center*, and evidence of abuses recognized by the judiciary in state courts could encourage the Supreme Court to reintroduce the original intent behind the public use requirement.

## B. MODERN PUBLIC USE IN STATE COURTS

### 1. Minnesota Courts’ Treatment of Public Use Justifications

An examination of the interpretation of public use by Minnesota state courts is illustrative of the problems created

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67. *Cottonwood Christian Ctr.*, 2002 WL 1827845, at \*10-18.

68. See *id.* at \*20; Commentary, *Cypress Dealt Blow in Church Land Case*, ORANGE CTY. REG., Aug. 7, 2002, 2002 WL 5456674.

69. *Cottonwood Christian Ctr.*, 2002 WL 1827845, at \*20 (quoting *99 Cents Only Stores v. Lancaster Redev. Agency*, No. CV 00-07572 SVW, 2001 WL 811056, at \*5 (C.D. Cal. June 26, 2001)).

70. *Id.*

71. *Id.* at \*18-19.

72. *Id.* at \*19. The blight determination was twelve years old and the city had not taken any action regarding blight until after the church purchased the property. *Id.*

when states take the U.S. Supreme Court's indulgent standard to extremes. The Minnesota model of the public use doctrine sets an unusually lenient standard favoring condemners.<sup>73</sup> The Minnesota Court of Appeals stated that "[o]ur scope of review in a condemnation case is very narrow."<sup>74</sup> In addition, Minnesota courts give great weight to the findings of the condemning authority.<sup>75</sup> Under this broad construction, public use is synonymous with public purpose.<sup>76</sup> Minnesota courts enforce this construction of public use by holding that a public entity can use its eminent domain power to transfer property from one private owner to another to further any conceivable public purpose.<sup>77</sup> This practice follows the guidelines set forth in *Midkiff* of using the rational basis test, with deference given to purposes outlined by legislatures as well as the municipalities that conduct the condemnations.<sup>78</sup> Furthermore, Minnesota appellate courts view public purpose as a question of fact and apply the clearly erroneous standard when reviewing lower court decisions.<sup>79</sup>

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73. See Todd A. Rogers, *A Dubious Development: Tax Increment Financing and Economically Motivated Condemnation*, 17 REV. LITIG. 145, 169 (1998) (stating that "[w]hile some states have tried to limit the potential misuse of eminent domain power in economic development areas . . . Minnesota fail[s] to place any restrictions upon a redevelopment agency's power to condemn"); see also Jennifer Maude Klemetsrud, Note, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783, 803 (1999) (citing the Minnesota Supreme Court's decision in *City of Duluth v. State*, 390 N.W.2d 757, 762 (Minn. 1986) (en banc), in a national review of eminent domain decisions as an example of a court that used an "extremely deferential" standard of review).

74. *County of Dakota v. City of Lakeville*, 559 N.W.2d 716, 719 (Minn. Ct. App. 1997) (citing *City of Duluth*, 390 N.W.2d at 763).

75. See, e.g., *Hous. & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 666 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 885 (Minn. 2002).

76. *Id.* at 668 (citing *City of Duluth*, 390 N.W.2d at 763).

77. See *id.*

78. Minnesota courts followed this position in past decisions, including upholding the validity of the public use justification for the transfer of private land to a private party. See, e.g., *Minneapolis Cmty. Dev. Agency (MCDA) v. Opus N.W., L.L.C.*, 582 N.W.2d 596, 599 (Minn. Ct. App. 1998); *City of Duluth*, 390 N.W.2d at 763; *Hous. & Redev. Auth. v. Minneapolis Metro. Co.*, 104 N.W.2d 864, 867, 875 (Minn. 1960).

79. See *Opus*, 582 N.W.2d at 599 (citing *State by Humphrey v. Byers*, 545 N.W.2d 669, 672 (Minn. Ct. App. 1996)). Because the clearly erroneous standard allows the reversal of lower courts' findings only if they are entirely without basis, it is particularly difficult to meet. See *N. States Power Co. v. Lyon Food Prods., Inc.*, 229 N.W.2d 521, 524 (1975) (en banc) (asserting that "clearly erroneous" is defined as "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole").

The Minnesota Supreme Court in *City of Duluth v. State*<sup>80</sup> exhibited this minimal standard of review of a municipality's public purpose.<sup>81</sup> The court gave deference to the condemning authority's proposed construction of a paper mill that would provide jobs to an economically depressed area.<sup>82</sup> Concurrently, the court noted that its evaluation would consist only of a review of the record, and a sufficient public purpose would be found if *any* evidence of public use was present, no matter how diminutive or informal.<sup>83</sup>

In a more recent case, *Minneapolis Community Development Agency (MCDA) v. Opus Northwest, L.L.C.*,<sup>84</sup> the Minnesota Court of Appeals further exhibited its deference to municipalities' definitions of public use.<sup>85</sup> The court permitted the city to allow a mid-priced retailer to take over another commercial landowner's property in a prime, downtown location to ensure the downtown's future vitality with lucrative economic activity.<sup>86</sup> The city's main justification for meeting the public purpose requirement was providing the convenience of moderately priced shopping downtown to the central business district's workers.<sup>87</sup> Another justification was that purchasing a site as unique as the subject site on the open market would be too expensive.<sup>88</sup> The city did not attempt to argue that the area was blighted, but rather emphasized the public benefit in improving the tax base.<sup>89</sup> The court agreed that the economic benefits constituted a valid public use, opting

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80. 390 N.W.2d 757 (Minn. 1986) (en banc).

81. *Id.* at 762.

82. *See id.* at 773.

83. *See id.* at 763 (citing *Hous. & Redev. Auth.*, 104 N.W.2d at 874).

84. 582 N.W.2d 596 (Minn. Ct. App. 1998).

85. *See id.* at 598 ("Great weight must be given to the determination of the condemning authority, and the scope of review is narrowly limited. If it appears that the record contains some evidence, however informal, that the taking serves a public purpose, there is nothing left for the courts to pass upon." (quoting *City of Duluth*, 390 N.W.2d at 763-64)).

86. *Id.* at 598, 601. The city wanted to locate a Dayton Hudson Corporation's Target store on Nicollet Mall to attract shoppers. *See* John Windrow, *Downtown Target Store OK'd [sic] Without Office Tower*, STAR TRIB., June 27, 1998, at A1. Downtown Minneapolis's Nicollet Mall is located in the center of its central business district. The City Council hoped to provide a niche where workers could shop for essentials on their lunch hours and provide substantial sales tax revenue, as Target stores are profitable. *See id.*

87. *See Opus*, 582 N.W.2d at 599-600.

88. *See id.* at 600, 602 n.4; Kanner, *supra* note 22, at 99.

89. *See Opus*, 582 N.W.2d at 598; Kanner, *supra* note 22, at 100.

again for a broad definition of the term.<sup>90</sup> It agreed with the city that the benefits of the mid-priced retailing function would be preferable to the large office building the property owner proposed to construct.<sup>91</sup> Thus, a city's mere preference for one redevelopment plan over another based on economic motivations suffices as a valid public use in Minnesota.

a. *Housing & Redevelopment Authority v. Walser Auto Sales, Inc.*

The Minnesota Court of Appeals's decision in *Housing & Redevelopment Authority v. Walser Auto Sales, Inc.*<sup>92</sup> approved a redevelopment scheme that embroiled the city of Richfield in controversy since it began negotiations with Best Buy to relocate its corporate headquarters to the city.<sup>93</sup> The proposed site is arguably one of the most prominent and economically viable intersections in the Twin Cities metropolitan area.<sup>94</sup> Construction of the complex required the removal of sixty-eight homes and apartment buildings, thirteen small businesses, and three auto dealerships.<sup>95</sup>

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90. See *Opus*, 582 N.W.2d at 599; Kanner, *supra* note 22, at 100.

91. See *Opus*, 582 N.W.2d at 600. One legal commentator disagreed with this decision and described it as "most egregious" and a "grotesque extrapolation of the U.S. Supreme Court's holding in *Berman v. Parker*." Kanner, *supra* note 22, at 99-100.

92. 630 N.W.2d 662 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 885 (Minn. 2002). For more on the subsequent history, see *infra* notes 99-101 and accompanying text.

93. The redevelopment site is at the intersection of Interstate 494 and Penn Avenue in Richfield, a first ring suburb of Minneapolis, Minnesota. See Dan Wascoe, Jr., *Best Buy, Richfield in Headquarters Talks*, STAR TRIB., Sept. 3, 1999, at D1.

94. Paul Walser, owner of the Walser auto dealership, confirmed the desirability of the location: "We are the second-largest Buick dealership in the country; while we would like to take credit personally for this accomplishment, it is largely due to the strength of our location." Paul Walser, Commentary, *Richfield's Rush to Help Best Buy*, STAR TRIB., Mar. 2, 2001, at A25.

95. Dan Wascoe, Jr., *Best Buy Proposal Draws Fire in Richfield: City Council Hears Opinions of Walser Consultant, Others*, STAR TRIB., Sept. 14, 2000, at B2. In addition to the loss of homes and businesses, the project required the city to finance a twenty-one million dollar reconstruction of the Penn Avenue bridge across Interstate 494 to accommodate the increased traffic. Laurie Blake, *Penn Avenue Bridge Project Won't Mess Up Holidays*, STAR TRIB., July 19, 2001, at B2. The bridge is only one of two in the Twin Cities and is designed in a special "X" shape to accommodate fifteen percent more traffic than a traditional freeway bridge, providing six lanes with space for up to eight more. Laurie Blake, *New Bridge Has Uncommon Design and an Eye Toward I-494's Future*, STAR TRIB., July 28, 2002, at B3.



At issue was whether the redevelopment scheme constituted a legitimate public purpose sufficient to validate the taking.<sup>96</sup> The court cited a “deferential scope of review” to justify the broad construction of the term “public use” used to uphold the condemnation.<sup>97</sup> The court reiterated that public use can be satisfied even if the land is turned over to a private entity.<sup>98</sup> Ironically, however, in an appeal to use tax increment financing to fund the redevelopment project in *Walser*, the Minnesota Court of Appeals reversed itself, holding the funding scheme invalid, because a large amount of land was improperly included in the redevelopment area.<sup>99</sup> Nonetheless, the condemnation stood despite the use of improper means, because the Minnesota Supreme Court had already affirmed it.<sup>100</sup>

In *Walser*, the elimination of blight and the creation of a lucrative tax base were held to be valid public purposes necessary to uphold the condemnation proceeding.<sup>101</sup> Minnesota courts clearly interpret the Supreme Court’s

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96. See *Walser*, 630 N.W.2d at 668.

97. *Id.* at 668 (citing *City of Duluth v. State*, 390 N.W.2d 757, 763 (Minn. 1986)).

98. *Id.* The court stated that “even though a public entity . . . turns over parcels [of land] to a private entity for use by that private entity, the condemnation will, nevertheless, be constitutional if a public purpose is furthered by such a transfer of land.” *Id.* (quoting *City of Duluth*, 390 N.W.2d at 763).

99. See *Walser Auto Sales, Inc. v. City of Richfield*, 635 N.W.2d 391, 403-04 (Minn. Ct. App. 2001), *aff’d*, 644 N.W.2d 425 (Minn. 2002).

100. See Dana Berliner, *Litigation of Challenges to Condemnations for Private Parties in 2001-2002*, at 367, 373-74 (A.L.I.-A.B.A. Course of Study, Jan. 10-12, 2002), WL SG059 ALI-ABA 367 (remarking that it was unfortunate that this holding did not precede the affirmation of the condemnations in case it could have affected that decision).

101. See *Walser*, 630 N.W.2d at 669. The court found sufficient evidence of blight in traffic congestion, noise, and the lack of some safety factors under the Americans with Disabilities Act (ADA). *Id.* See *supra* note 29 for Minnesota’s definition of “blighted area.”

The Best Buy corporate headquarters is expected to accommodate nearly 7,500 employees. See Dan Wascoe, Jr., *Best Buy is Ready to Begin Razing in Richfield*, STAR TRIB., May 23, 2001, at B1. The cost of the project will be \$160 million. *Id.* Following the Court of Appeals’s ruling, seven lawsuits challenging the project remained. *Id.* The lawsuits applied to a number of environmental and procedural issues. *Id.* They included a challenge to the lack of a public referendum on the project, two challenges to the city’s use of tax-increment financing for the project, another over the adequacy of the city’s environmental analysis of the project’s impact, and a challenge to the Metropolitan Council’s decision not to designate the project as significant to the region. *Id.*

holdings in *Berman* and *Midkiff* to allow literal public use to be subsumed by the public purpose of generating increased revenue.

## 2. Other State Courts' Treatment of Public Use Justifications

Minnesota courts are not alone in their broad interpretation of public use. In the years since the Supreme Court's monumental holdings in *Berman* and *Midkiff*, an examination of state court holdings outside Minnesota exhibits a similar tendency to construe a variety of condemnation actions by private developers against private landowners to be in the public interest. Notably, these include constructing an automobile assembly plant,<sup>102</sup> facilitating an auto racetrack,<sup>103</sup> building the World Trade Center,<sup>104</sup> accommodating a professional football franchise,<sup>105</sup> extending a petroleum pipeline,<sup>106</sup> and expanding the Kansas City International Airport.<sup>107</sup> Taken in combination, these decisions could provide further support for a broad definition of public use.

Despite these lenient holdings, other state courts have attempted to narrow the seemingly inexorable public use doctrine in circumstances that appeared particularly egregious. These situations appear where the benefit to a private party at the expense of another greatly outweighs any genuine public benefit. Some of these attempts arose in the past two decades.<sup>108</sup> Furthermore, recent decisions narrowing the public use doctrine may signal an imminent change in judicial attitude, shifting away from the lenient standard of review.<sup>109</sup> Examining circumstances where courts held that redevelopment efforts did not confer a realistic benefit to the

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102. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459-60 (Mich. 1981) (per curiam).

103. *State ex rel. Tomasic v. Unified Gov't of Wyandotte County*, 962 P.2d 543, 554 (Kan. 1998).

104. *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 190 N.E.2d 402, 404-05 (N.Y. 1963).

105. *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 842-43 (Cal. 1982).

106. *State ex rel. State Highway Comm'n v. Eakin*, 357 S.W.2d 129, 134 (Mo. 1982).

107. *City of Kansas City v. Hon*, 972 S.W.2d 407, 413-14 (Mo. Ct. App. 1998).

108. See *infra* Part II.B.2a-b.

109. See, e.g., Editorial, *Mississippi Churning*, WALL ST. J., Jan. 4, 2002, at A12 ("After years of slumber, citizens and courts are waking up to the abuses eminent domain can create.").

public draws a dividing line between reasonable and unreasonable condemnations.

*a. Improper Public Use Justifications in State Courts*

A Michigan court's holding provides an example of a development project that could not reasonably be a public use. In *City of Center Line v. Chmelko*,<sup>110</sup> the Michigan Court of Appeals ruled that the city's use of its eminent domain power to persuade an auto dealership not to leave by allowing it to expand its parking lot was not a valid public purpose.<sup>111</sup> In exercising heightened scrutiny review,<sup>112</sup> the court recognized that the real motivation behind the city's attempted acquisition was to facilitate good relations with the auto dealership, and not to alleviate a parking shortage or eliminate non-existent blight.<sup>113</sup> The court rejected this justification of the public use requirement, invalidating the speculative prospect of future jobs or additions to the commercial industrial base as legitimate reasons for a taking.<sup>114</sup>

In another auto related case, the Mississippi Supreme Court upheld the rejection of a proposal to allow a Nissan car manufacturer to take thirty acres owned by three families to provide a parking lot and access road for its factory.<sup>115</sup> The

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110. 416 N.W.2d 401 (Mich. Ct. App. 1987).

111. *Id.* at 407.

112. *Id.* at 404. The Michigan Supreme Court in the landmark case of *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (per curiam), established heightened scrutiny as the appropriate test to use under the public use doctrine if a private party's interest is predominant. *See id.* at 459-60. The court also established that the public interest must prevail, and not be "speculative or marginal." *Id.* Michigan state courts can apply stricter scrutiny to takings law than that established by the Supreme Court's precedent; it is well-established that states may confer greater rights on their citizens than are set by the federal constitution, but not less. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977). As Justice Brennan pointed out, "[s]tate constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." *Id.*

113. *See Chmelko*, 416 N.W.2d at 404-05, 407.

114. *See id.* at 406. The court specified that the fact "[t]hat the automobile dealer is a substantial factor in the business life of the city does not permit it to use city government to eliminate small businesses in order to facilitate its growth." *Id.* at 407. *But see* *City of Duluth v. State*, 390 N.W.2d 757, 764 (Minn. 1986) (holding that the prospect of new jobs in an economically decimated area was an appropriate public use).

115. *Mississippi Churning*, *supra* note 109.

state's executive director of its Development Authority admitted that the primary justification behind his support for the condemnation was the message that would be sent to other companies if Nissan's wishes were not met.<sup>116</sup> The court suggested that this blatant benefit to a private auto manufacturer was not a sufficiently public function.<sup>117</sup>

In a Delaware state court decision that invalidated a public use justification of an eminent domain proceeding because the private entity was the primary beneficiary, the Delaware Supreme Court held that the city of Wilmington's plan for a public parking facility actually provided the "paramount benefit" for expansion to an adjacent news-journal company.<sup>118</sup> Approving the heightened scrutiny test used by the Michigan Supreme Court in *Poletown Neighborhood Council v. City of Detroit*,<sup>119</sup> the court also followed the U.S. Supreme Court's earlier test in *City of Cincinnati v. Vester*<sup>120</sup> that the determination of public use is properly a question for judicial review, rather than the Court's later designation of deference to legislative designation outlined in *Berman*.<sup>121</sup>

The New Hampshire Supreme Court added to this growing body of decisions that apply restrictions to the breadth of public use by using an equation to determine the validity of the public's benefit.<sup>122</sup> At issue in *Merrill v. City of Manchester* was whether the city could condemn open forestland for construction of an industrial park, thereby benefiting the local economy with new jobs and an increased tax base.<sup>123</sup> The state's constitution forbids condemnations that "will be primarily of benefit to private persons or private uses."<sup>124</sup>

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116. *Id.* The executive director of the Mississippi Development Authority said, "It's not that Nissan is going to leave if we don't get that land. What's important is the message it would send to other companies if we are unable to do what we said we would do." *Id.*

117. *See id.*

118. *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227, 231 (Del. 1986).

119. 304 N.W.2d 455, 459-60 (Mich. 1981) (per curiam). *See supra* note 112 for an explanation of the Michigan Supreme Court's application of heightened scrutiny.

120. 281 U.S. 439, 446 (1930). For discussion see *supra* note 35 and accompanying text.

121. *See Wilmington Parking Auth.*, 521 A.2d at 231.

122. *See Merrill v. City of Manchester*, 499 A.2d 216, 217 (N.H. 1985).

123. *See id.* at 217-18.

124. *Id.* at 217 (citing *In re Opinion of the Justices*, 114 A.2d 514, 516 (1955), and interpreting Part II, Article 5 of the New Hampshire Constitution).

Testing this provision, the court used a formula to add the benefits of the new project with the benefits of removal of the prior use and subtract the social cost of the loss of the property in its present form.<sup>125</sup> The result suggested that the loss of open space that benefited the public health outweighed any possible economic incentives.<sup>126</sup> Because the court did not find a direct benefit to the public through construction of an industrial park, it used a balancing test and concluded that the preservation of open space provided the greater benefit to the public.<sup>127</sup>

In a case that similarly benefited a private enterprise, the Illinois Supreme Court invalidated a condemnation for a racetrack's parking lot. In *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*,<sup>128</sup> the court determined that while a public benefit would accrue from the construction of a parking facility to alleviate traffic congestion and raise more tax revenue through increased profitability, it was not a sufficient "public purpose" under the U.S. Constitution's eminent domain power.<sup>129</sup> The court explained the distinction by stating that almost all commercial activity conceivably benefits the public, but this was not a public purpose because the racetrack operated exclusively for private profit.<sup>130</sup>

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125. See *Merrill*, 499 A.2d at 217.

126. See *id.* at 217-18.

127. See *id.* at 218-19. In a similar effort to preserve open space at the expense of the construction of a big-box store, a New York court precluded Home Depot from constructing one of its big-box stores. *Home Depot, USA, Inc. v. Town of Mount Pleasant*, 741 N.Y.S.2d 274, 275 (N.Y. App. Div. 2002). This case did not involve a condemnation and the town itself rejected Home Depot's site plan approval permit due to the store's unsuitability for the site. *Id.* Upholding the district court under arbitrary and capricious review, the court cited the arguments that the store's design would involve the irretrievable removal of a forested hillside and would need to be "shoehorned" into the proposed site that was insufficient to house the project. *Id.* at 275-76. The court assessed the project's possible deleterious impact on the physical environment and not its potential to improve the tax base. *Id.* at 274-76.

128. 768 N.E.2d 1 (Ill. 2002).

129. *Id.* at 8-11.

130. *Id.* The court elaborated,

[M]embers of the public are not the primary intended beneficiaries of this taking. . . . This condemnation clearly was intended to assist [the racetrack] in accomplishing [its] goals in a swift, economical, and profitable manner. . . . As Justice Kuehn stated in dissent in the appellate court, "If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to

Finally, in a high profile example of public use limitations, the New Jersey Superior Court rejected the condemnation of a home for the expansion of a driveway to enable limousines to turn around in front of businessman Donald Trump's casino.<sup>131</sup> Despite exercising conventional standards of deferential review, the court viewed this conveyance of private land to Trump as outside the scope of reasonableness, because the state did not limit what could be done with the property once it was conveyed.<sup>132</sup>

In contrast to the deferential review exercised by the federal courts, some state constitutions call for heightened scrutiny when eminent domain purports to benefit a private party.<sup>133</sup> This results in the rejection of development schemes that would likely pass federal constitutional muster. These incongruities showcase divergence among judicial attitudes toward takings law.

*b. Other Limitations on the Eminent Domain Power*

Other courts have placed further limits on condemners' rights in eminent domain proceedings, not just via a restriction on the application of public use, but also by giving condemnees more rights. In 2000, the United States Court of Appeals for the Sixth Circuit affirmed property owners' rights to challenge a municipality's power of eminent domain, for lack of a public purpose, in federal court.<sup>134</sup> This holding implies recognition of the need to give property owners more options in contesting

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develop land cannot justify a surrender of ownership to eminent domain."

*Id.* at 10 (citations omitted).

131. See *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. Law. Div. 1998).

132. See *id.* at 110-11. Vera Coking, the homeowner, had lived in the house for nearly four decades. Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 297 (2000). Before Trump's offer to buy her property, another casino entrepreneur, Bob Guccione, offered to buy Coking's house for one million dollars, nearly 300% more than its appraised value. *Id.* at 298. When she refused, Guccione built a steel and concrete structure completely around her home to intimidate her. *Id.* at n.111. Guccione then sold the structure to Trump, whose crews demolished it. *Id.* Attempting to bully Coking off the property, the workers started a fire on her roof, broke windows, removed her fire escape, and even dropped concrete blocks through the roof, extensively damaging the home. *Id.*

133. See, e.g., *supra* notes 112, 124 and accompanying text.

134. See *Montgomery v. Carter County*, 226 F.3d 758, 771-72 (6th Cir. 2000).

condemnations.

In another challenge to a condemnation action, the Pennsylvania Commonwealth Court ruled that a city's presentment of its power directly to a developer was an unlawful delegation of control.<sup>135</sup> The city had improperly contracted with a redevelopment agency, giving it discretion over the condemnation and its timing.<sup>136</sup> This power, the court reminded the city, is an attribute of sovereignty.<sup>137</sup> Private developers cannot buy this authority.<sup>138</sup>

The North Carolina Supreme Court also limited the power of a regional water authority by holding that it could only condemn the parcel of land that was needed to construct a water supply lake.<sup>139</sup> While the lake itself was clearly a public use appropriate under eminent domain, an additional parcel not needed for the lake was of substantial value, and the water authority could not justify its condemnation.<sup>140</sup> In combination, these developments provide further support for the growing trend to place limits on the application of public use.

### 3. Judicial Review of Public Use and Scrutiny Standards

As the foregoing examples indicate, state courts are split regarding whether strict scrutiny or rational relationship review, employed by most federal courts, is the appropriate standard to evaluate public use justifications. Courts favoring strict scrutiny typically conduct an independent analysis of potential public benefits, while courts operating under the rational relationship standard usually find a cursory review of the existing record sufficient.<sup>141</sup>

Under strict scrutiny, the condemnee bears the burden of proving the public use rationale is not legitimate.<sup>142</sup> Because

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135. See *In re Condemnation of 110 Washington St.*, 767 A.2d 1154, 1161 (Pa. Commw. Ct. 2001), *appeal denied*, 788 A.2d 379 (2001).

136. See Kanner, *supra* note 63, at A21.

137. See *id.*

138. See *id.*

139. See *Piedmont Trial Reg'l Water Auth. v. Sumner Hills Inc.*, 543 S.E.2d 844, 849 (N.C. 2001). The water project only required approximately 48 of the 145 acre tract requested by the Water Authority. *Id.* at 845-46.

140. *Id.* at 847-49. North Carolina state law allows the condemnation of an excess parcel only if it will retain little value after the taking. N.C. GEN. STAT. § 40A-7(a) (2002).

141. See Klemetsrud, *supra* note 73, at 798.

142. *Id.* at 799 (citing NICHOLS ON EMINENT DOMAIN, *supra* note 15, at § 7.03[12]).

courts enter the analysis presuming a legitimate public use even under this heightened scrutiny, the principle inquiry concerns the predominant purpose of the taking.<sup>143</sup> Strict scrutiny requires demonstration of a “compelling” need to transfer land from one private owner to another.<sup>144</sup> The means chosen to achieve this goal must also be the most narrowly tailored to achieving this end.<sup>145</sup> If a private interest is merely an incidental beneficiary, that showing is insufficient to overcome the taking.<sup>146</sup> Rather, the challenger must show that the private interest was the primary beneficiary.<sup>147</sup> This is a high standard to overcome.<sup>148</sup>

Since the Supreme Court’s 1954 decision in *Berman*, lower courts typically use the minimal standard of rational relationship review for condemnation proceedings.<sup>149</sup> This process places the burden on the challenger.<sup>150</sup> The primary difference between the standards is that rational relationship review lacks an analysis of the primary beneficiary.<sup>151</sup>

As exhibited by the preceding discussion of the eminent domain case law, public use as applied by the judiciary becomes weakened to public purpose where most any minimal purpose will suffice. Because of the deterioration in the meaning of the public use clause, some courts now limit these condemnations, particularly where the primary beneficiary is a private party. These limitations may indicate an imminent change in judicial treatment of the government’s eminent domain power.

### III. REMEDYING THE FLAWED PUBLIC USE DOCTRINE

The evolution of the public use requirement of the eminent domain power virtually obliterated any limitation on the

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143. See *id.* (citing NICHOLS ON EMINENT DOMAIN, *supra* note 15, at § 7.03[11][b]; Merrill, *supra* note 55, at 67).

144. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 220 (1995).

145. *Id.*

146. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458 (Mich. 1981).

147. See *id.* at 450-59.

148. For instance, the court in *Poletown* held that the proposed condemnation did primarily benefit the public despite the fact that the incoming corporation, General Motors, would profit greatly. *Id.* at 458. The court’s reasoning was based on tax revenues and jobs sure to accrue to Detroit, a city in dire economic straits at the time of the proposal. See *id.* at 458.

149. See Klemetsrud, *supra* note 73, at 803.

150. See *id.*

151. See *id.*



government when economic benefit will accrue.<sup>152</sup> Some commentators warn that corporations may soon strip the significance from the concept of private property.<sup>153</sup> While some may term it a mere backlash, recent decisions by courts attempting to limit cities' bulldozing power prove that judges are concerned.<sup>154</sup>

Though the current framework needs reform, it is important to recognize the value of the eminent domain power to revitalization efforts.<sup>155</sup> The government uses this power to rejuvenate economically depressed areas.<sup>156</sup> The current framework, however, often benefits the wealthy at the expense of common businesses and homeowners in areas that, although not posh, are not depressed.<sup>157</sup> If the concept of private property is to retain its meaning, takings reform is urgently needed.<sup>158</sup>

#### A. COURTS SHOULD HEIGHTEN JUDICIAL REVIEW OF CONDEMNATIONS TO STRICT SCRUTINY

The first change necessary to prevent abuses in the transfer of private land to another private party is to require strict scrutiny review. Even though modern courts reject a narrow interpretation of the public use language from actual use by the public to merely some conceivable public purpose,<sup>159</sup> the inclusion of the words "public use" in the Takings Clause had to mean something.<sup>160</sup> The language states "nor shall private property be taken for public use, without just

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152. See *supra* notes 38-54, 73-107 and accompanying text.

153. See *infra* notes 178-79.

154. See *supra* notes 55-63, 110-38 and accompanying text.

155. Blight removal, undertaken via the government's eminent domain power, was originally an effort to improve the public's "health and safety," which is a legitimate goal. See *Lefcoe*, *supra* note 27, at 992.

156. The downside of these efforts, however, may be that the aesthetic improvement they provide may not sufficiently rehabilitate communities to provide a better environment for the poor. Broussard, *supra* note 26, at 107 (citing *FRIEDMAN*, *supra* note 26, at 151).

157. See *id.*

158. See *Womack*, *supra* note 45, at 316 (arguing that the situation is so dire that "there is ample evidence to suggest that local governments are taking advantage of the discretion afforded them by this standard to condemn property in order to generate higher property and sales tax revenues").

159. See *supra* note 20 and accompanying text.

160. Although scholars debate the Framers' exact intentions for public use, this debate assumes it did have some meaning. See *supra* note 13 and accompanying text.

compensation.”<sup>161</sup> Following the legislative canon of construction *expressio unius est exclusio alterius*, to include one thing is to exclude another.<sup>162</sup> The fact that the Takings Clause language specifies takings for a public use, rather than a private one, implies that private uses were not intended. In contrast to this logical conclusion, the commonly employed rational relationship test currently necessitates a lower standard of review. The resulting deference to the legislature and local boards means almost any rationale for a taking, regardless of whether the primary benefit is to a private party or the public, suffices as not arbitrary and capricious.<sup>163</sup>

Criticism of this proposal will likely focus on the increased burden on courts resultant from more intensive review. These measures, however, are necessary to preserve private property rights fundamental to the Framers.<sup>164</sup> It seems entirely appropriate to require this heightened standard when private parties are allowed to circumvent the private market and confiscate property from others, while cities often pay the “just compensation.” Likewise, because courts function to provide equal justice under the law, the power disparities inherent in litigation between individual homeowners and small business owners compared with municipalities functioning at the behest of corporations, also compel stricter review.<sup>165</sup>

Had the Minnesota court applied strict scrutiny in *Walser*, the taking attempt likely would have failed. The city would have had the opportunity to convince the court that increased revenue and jobs could serve as a sufficiently compelling government interest to survive the first prong of the test. The second prong, however, requiring that the project was the most narrowly tailored, or least restrictive and least discriminatory

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161. U.S. CONST. amend. V.

162. *Wright v. Brady*, 889 P.2d 105, 108 (Idaho Ct. App. 1995).

163. The *99 Cents Only Stores* case is an exception. See *supra* note 63 and accompanying text. The court found the city's rationale so egregiously irrational that it failed the minimal rational relationship review. See *supra* note 61 and accompanying text.

164. See *supra* note 21 (discussing Roger Clegg's argument that the Framers intended the public use clause to have a literal meaning for condemnations).

165. The *Walser* case is an example of that disparity; homeowners and business owners lost to the powerful Best Buy corporation. *Hous. & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 885 (Minn. 2002).

alternative to meet that end, would likely have failed.<sup>166</sup>

1. Conditions that Prompted *Berman v. Parker* are Changing

Minimal rational relationship review of proposed redevelopment projects, established by the Supreme Court in *Berman*, occurred during the 1950s, an era that fostered the rise of the current American metropolitan framework.<sup>167</sup> Consisting of central cities ringed by inner and outer suburbs connected to the hubs by a spoke-like network of highways, the implementation of this system required the eminent domain authority to make way for development geared toward the automobile. Those days are gone. As exhibited by the rise in private use takings, due to the increasing unavailability of prime urban properties, most major metropolitan areas are heavily built up and congested. Because the modern infrastructure is already established, the current need for takings is not as great as it once was. The Supreme Court could appropriately revisit its reasoning in *Berman*, the decision that most commentators agree heralded the broad interpretation of the public use doctrine.<sup>168</sup> Restricting the doctrine would not contradict the old precedent, because the greater need now is not to foster development, but rather to prevent abuse by the eminent domain authority.

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166. The court itself supported its decision by stating that “[a]bsolute necessity is not required for a finding of public purpose, rather it is enough to find that the proposed taking is *reasonably necessary or convenient* for the furtherance of a proper purpose.” *Id.* at 670 (emphasis in original) (quoting *Minneapolis Cmty. Dev. Agency v. Opus N.W., L.L.C.*, 582 N.W.2d 596, 600 (Minn. Ct. App. 1998)). If absolute necessity was required, the project would likely have been held invalid. The court’s inclusion of the term convenient is particularly troublesome; while other courts seem to be reigning in redevelopment proceedings under the guise of public purpose, the Minnesota court seems to be abandoning virtually any standards. One would be hard-pressed to find another area of the law where mere convenience is a sufficient rationale for one side to prevail.

A different result in *Walser* would have had positive implications. First, the courts would not have been tied up in seven subsequent lawsuits. See *supra* note 101. Secondly, public and community morale would not have been sacrificed, decreasing the vulnerability citizens feel toward corporate giants. Further, a limit would have been placed on the abuse of the public use requirement.

167. See *supra* notes 38-47 and accompanying text.

168. See *supra* note 39 and accompanying text.

## 2. Factors Courts Should Consider When Reviewing Condemnations

Another way for courts to raise the level of scrutiny when reviewing condemnations is to consider reasons why upholding the condemnations could be detrimental. These factors include the uniqueness of land and evidence of ulterior motives.

### a. Land Uniqueness

Advanced judicial review of a public use justification for a taking requires consideration of factors not considered by the *Walser* court. First, land is unique. This is one reason why private property is a fundamental element of our democracy.<sup>169</sup> Land is also scarce, particularly at prime locations in densely built metropolitan areas like the Twin Cities of Minneapolis and St. Paul.<sup>170</sup> The potential for improper influence arises when corporations are motivated to search for the most desirable locations in a city.<sup>171</sup> Wielding potential jobs and tax revenue as a benefit to the public, corporations can seize these properties, thereby having an advantage over those who bought first on the open market.<sup>172</sup> This hypothetical became reality in the *Walser* case. The intersection of I-494 and Penn Avenue is one of the most prominent and heavily trafficked locations in the Twin Cities metropolitan area.<sup>173</sup> The ousted auto

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169. See RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 3 (1993) (arguing that a constitutional government's ability to survive depends on limiting the government's power to confiscate, seize, destroy, or regulate private property).

170. See generally Alex Schwartz, *Rebuilding Downtown: A Case Study of Minneapolis*, in *URBAN REVITALIZATION* 163, 163-99 (Fritz W. Wagner et. al. eds., 1995) (providing statistical analysis of the Twin Cities metropolitan area's density and explaining challenges of facing revitalization efforts in a densely built infrastructure).

171. Epstein describes the problems inherent when the government not only takes private property, but then subsequently *gives* it to certain individuals. See EPSTEIN, *supra* note 169, at 4. Epstein goes so far as to argue that if the government does not establish the legitimacy of its taking, "it is little better than the thief who attempts to convey good title to a third person, especially to a purchaser in bad faith." *Id.*

172. See, e.g., Robyn E. Blumner, *Developers Find Unfair Way to Take Property*, ST. PETERSBURG TIMES, Nov. 12, 2000, at 1D, 2000 WL 26335418 (citing the case of a flower shop in downtown Pittsburgh pushed out by a \$522 million redevelopment project where the owner of the shop said no one attempted to buy his property on the open market, because "they want to pay under the market value").

173. See Laurie Blake, *Richfield May Face Traffic Challenges*, STAR TRIB., Feb. 3, 2000, at B2 (discussing the possible consequences of exacerbating

dealerships that operated there for decades could not replicate the site on the open market. Best Buy connived its way into the prominent location for its corporate headquarters.<sup>174</sup> This windfall will increase the corporation's presence and notoriety.<sup>175</sup> The fact that properties like this cannot be replicated on the open market is another public policy reason why land transfers require further scrutiny.

*b. Possibility of Ulterior Motives Requires Strict Scrutiny*

Even if courts find it too burdensome to apply heightened scrutiny to all takings cases where public use is at issue, the higher standard should doubtless be triggered when improper motives are evident.<sup>176</sup> In contrast to the view most courts adopt to exercise deference to legislatures in condemnation proceedings, when the primary beneficiaries are private interests, there is significant risk for abuse. Because the legislature did not enact the eminent domain legislation with the intention that a private party would benefit, but rather envisioned a benefit for the public, this situation necessitates heightened review. It is uniquely the function of the courts to provide a check on potential abuse.<sup>177</sup>

Despite this unique role, courts are often reluctant to

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congestion in the already heavily-trafficked I-494 stretch through the Minneapolis suburbs of Eden Prairie, Bloomington, Edina, and Richfield).

174. See *supra* note 101 and accompanying text.

175. One suggestion for site selection for power centers housing retail giants and corporate headquarters is to select abandoned industrial facilities or otherwise undevelopable sites. See Truitt, *supra* note 59, at 40. Municipalities seeking redevelopment to increase funding could make zoning concessions in return for corporate funded environmental clean-up of an area. See *id.* Because accessibility by customers is not at issue, this would be more feasible for corporate headquarters than retail stores. This solution would not allow corporations to seize any property they desired, but it would allow development beneficial to both sides, without encountering community opposition and litigation likely to tarnish the corporation's image, such as that experienced by Best Buy in *Walser*.

176. While it approved the condemnation, the Michigan Supreme Court in *Poletown* nevertheless recognized that heightened scrutiny should be applied when the benefit to private interests is apparent. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459-60 (Mich. 1981). But see Thomas Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355, 374 (arguing that although improper motivations can arise through takings for the benefit of private entities, those benefits can also accrue through traditional public takings; therefore, if a heightened level of scrutiny is employed, it should be used similarly in all condemnation proceedings).

177. See Jones, *supra* note 132, at 301.

decipher motivations because of the inherent difficulty.<sup>178</sup> Adding to the difficulty is that improper benefits to the private entity are only a matter of degree; a private benefit incidental or equal to the public benefit is proper if it does not dwarf the public benefit.<sup>179</sup> Additionally, public benefits like jobs and tax revenues may validly result from private benefits.<sup>180</sup> Under the current framework, however, the extent of such benefits is often speculative. Nevertheless, municipalities are willing to gamble with such projects in an attempt to snatch them from a rival municipality.<sup>181</sup> Because they wield employment opportunities and a large tax base, corporations clearly have the upper hand in this financing war. Improper motivations thus become an inevitable outcome of this struggle.

Despite the limitations and difficulties inherent in an examination of motivations, such review is necessary because of the importance of private property rights to the maintenance

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178. See NICHOLS ON EMINENT DOMAIN, *supra* note 15, § 7.03[11][b]. Sometimes improper motivations are obvious. One commentator discussed what has become a common occurrence:

It has become a familiar scenario in redevelopment cases that an owner of land located in an area with economic potential is approached by a private developer with a purely private offer to buy the former's land for the latter's plainly and concededly private profit-making project. Yet, after the parties fail to make a consensual deal, the local municipality miraculously appears on the scene, declares the targeted land to be "blighted," announces a redevelopment project, and proceeds to condemn the subject property for the very developer who was unable or unwilling to buy it in a voluntary transaction at a negotiated market price.

Kanner, *supra* note 22, at 95.

179. See Ross, *supra* note 176, at 373. Improper motivations may be defined not only by the comparative weight of the public versus private benefit, but may occur when the taking is to benefit a favored citizen or hurt a disfavored citizen. See *id.* at 370-71. Such a scenario raises equal protection questions, but under this doctrine, heightened scrutiny would only be triggered if a suspect class, based on race or sometimes alienage, is the subject of the discrimination. But see Jones, *supra* note 132, at 307-08 (arguing that property rights should trigger strict scrutiny on the basis that they are "fundamental" rights within the "penumbra" of the zone of privacy test).

180. For example, the Best Buy headquarters at issue in *Walser* will provide 7,500 jobs and tax revenues from a \$160 million complex. See *supra* note 101.

181. Michael M. Schultz & F. Rebecca Sapp, *Urban Redevelopment and the Elimination of Blight: A Case Study of Missouri's Chapter 353*, 37 WASH. U. J. URB. & CONTEMP. L. 3, 58-59 (1990) ("Public use in the context of urban redevelopment not only includes the elimination of slum and blighted areas but also includes purely economic legislation designed to improve the fiscal well-being of the city.").

of democracy.<sup>182</sup> The burden must be shifted to municipalities, because they are likely to be swayed by the revenue potential presented by corporations that dwarfs that of individual landowners. Municipalities should have to prove their motivations are honorable, rather than forcing private citizens, already fighting an uphill battle against corporations with clout and resources, to prove the motivations are wholly improper.

#### B. POWER IMBALANCES BETWEEN THE GOVERNMENT AND INDIVIDUAL PROPERTY OWNERS REQUIRES REINFORCED DUE PROCESS

Another factor implicating the ineptitude of the current application of the public use requirement is evidenced by the due process clause. The importance the Framers placed on property ownership is reinforced by the language in the Fifth Amendment that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>183</sup> The current framework does not come close to meeting this requirement. The fact that the Framers listed property together with the vital protections of life and liberty makes it clear that they intended the process for a deprivation of property to be significant.

The imbalance of power inherent in condemnation proceedings raises questions about the sufficiency of due process. Individual citizens, as homeowners and business owners, typically face cities or city planning agencies.<sup>184</sup>

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182. Cf. *infra* note 183 and accompanying text (discussing the significance with which the Framers’ viewed property rights).

183. U.S. CONST. amend. V. While this provision only applies to the federal government, it extends to the states through the Fourteenth Amendment. See U.S. CONST. amend. XIV. The placement of this provision in the Fifth Amendment rather than the enumerated power of Article I, section 8, may support the idea that the eminent domain power is inherent, not just created by the Constitution, and should be broadly construed. Womack, *supra* note 45, at 309 (citing *Kohl v. United States*, 91 U.S. 367, 371 (1875)). If the Constitution does not grant but merely recognizes this power, then it should be inhibited by few restraints. *Id.* (citing Steven R. Hobson, II, *Preventing Franchise Flight: Could Cleveland Have Kept the Browns by Exercising Its Eminent Domain Power?*, 29 AKRON L. REV. 665 (1996)). But see *id.* at 310 (recognizing that the “power of eminent domain is clearly limited by the inclusion of public use within the terms of the Fifth Amendment” and that “the U.S. Supreme Court has recognized the concept as a limitation since 1896”).

184. See, e.g., *Hous. & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 665 (Minn. Ct. App. 2001), *aff’d*, 641 N.W.2d 885 (Minn. 2002).

Private landowners are at a disadvantage fighting against cities with vast taxpayer revenues to pay good attorneys and to appeal rulings.<sup>185</sup> If a single private landowner's property is taken, she may not have the money to challenge the city's action in court.<sup>186</sup> This circumstance makes the concern over insufficient due process higher than it would be for a group of landowners who can divide costs. Furthermore, the minimal standard of review exercised by many courts often employs a presumption to accept any justification set forth by a city.<sup>187</sup> To the contrary, it seems that the power imbalance between cities and private citizens requires more review than would typically be due. Just as courts would not easily accept an abbreviated process with a citizen's life or liberty, courts should similarly reject this minimal process for property deprivations.

### C. COURTS SHOULD SET A HIGHER BLIGHT STANDARD

The current blight framework, as a justification for a taking, must be reexamined as incorporated into the public use doctrine. Currently, most municipalities only require that an area be characterized by one of the blight conditions to qualify as blighted.<sup>188</sup>

#### 1. Require More Deleterious Conditions for Blight

The first concern under the blight framework is the potential for abuse. Due to the broad range of conditions and the degree of subjectivity inherent in such an inquiry, cities can characterize almost any area as blighted.<sup>189</sup> Residents and commentators questioned the validity of the blight conditions supposedly present at the Richfield site in *Walser*.<sup>190</sup> The city averred that blight existed due to the proximity of car

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185. *But see supra* note 101 (indicating that the prospering Walser Auto Sales, Inc. and its contemporaries pursued seven lawsuits following the Minnesota Court of Appeals decision in *Walser*). The Walser auto dealership paid at least \$1.8 million in legal fees. Dan Wascoe, Jr., *Walser Draws the Line on Principle*, STAR TRIB., Feb. 4, 2002, at D1.

186. *See* Broussard, *supra* note 26, at 99 (illustrating the bleak scenarios faced by poor, displaced residents of a condemned neighborhood who would lack the means to pursue a lawsuit).

187. *See supra* notes 39-44 and accompanying text.

188. *See supra* note 33 and accompanying text (listing the most commonly cited deleterious conditions).

189. *See supra* note 28 and accompanying text.

190. *Hous. & Redev. Auth. v. Walser Auto Sales, Inc.*, 630 N.W.2d 662, 668-69 (Minn. Ct. App. 2001), *aff'd*, 641 N.W.2d 885 (Minn. 2002).



dealerships to residential homes, heavy traffic to the dealerships,<sup>191</sup> noise created by public address systems, some inadequate parking facilities, the lack of disabled access outlined under the Americans with Disabilities Act (ADA), and obsolete mechanical systems.<sup>192</sup> Despite these problems, the building consultant who prepared this analysis found that “[t]he commercial spaces are not necessarily obsolete for their present or continued use.”<sup>193</sup> There is no evidence that the dealerships were given the option to upgrade their facilities to prevent the condemnation. If given the choice between condemnation and restoration, the dealerships likely would have chosen to save their prospering businesses.<sup>194</sup> Ironically, the court supported the condemnation on blight grounds not only because it fell within the broad statutory definition of blight, but also because the “experience and knowledge of [city of Richfield] staff, council and board members supported the findings that conditions of blight existed in the Project area.”<sup>195</sup> These assessments by the staff, council, and board of the city of Richfield hardly constitute objective opinions. Employees of the city fought to obtain the project for their suburb, rather than lose it to a rival.<sup>196</sup> As a party to the case, the employees’ opinions should not be accepted uncontested. The decision of the Minnesota Court of Appeals to give great weight to city officials’ opinions is not surprising, given its deference to municipalities’ findings.<sup>197</sup>

A second concern under the blight framework is that redeveloping an area that is not blighted not only does an injustice to the existing property owners, but also has additional harmful effects. As one commentator explained,

When the extraordinary powers of legislation designed to combat

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191. Ironically, the corporate headquarters employing nearly 7,500 will indisputably bring more traffic and pollution to the already congested area, one of the primary concerns voiced by neighborhood residents. Dan Wascoe, Jr., *Best Buy is Ready to Begin Razing in Richfield, Headquarters Project Gets Last Remaining Permit and Will Proceed Despite Lawsuits*, STAR TRIB., May 23, 2001, at B1.

192. See *Walser*, 630 N.W.2d at 669.

193. *Id.*

194. See *Walser*, *supra* note 94 (“It is clear we do not want to leave.”).

195. *Walser*, 630 N.W.2d at 669.

196. See Dan Wascoe, Jr., *Best Buy Tension Rising in Richfield*, STAR TRIB., Feb. 18, 2001, at B1 (“City officials have . . . declared some neighborhoods blighted to promote redevelopment, which they say is necessary to compete with other communities.”).

197. See *supra* notes 73-75 and accompanying text.

blight and renew decayed urban areas are used as a fiscal device to promote industrial, commercial, and business development in a project area that is merely underdeveloped rather than blighted, competitive speculation may be turned loose. By misemploying the extraordinary powers of urban renewal, a redevelopment agency captures pending tax revenues which it can then use as a grubstake to subsidize commercial development within the project area in the hope of striking it rich.<sup>198</sup>

Overuse of the blight justification has the added consequence of compelling taxpayers in one section of the community to disproportionately subsidize those corporations building to profit in areas that do not really need assistance.<sup>199</sup> Tax dollars are used to fund redevelopment of blighted areas to spread the burdens of improving the community.<sup>200</sup> It is improper to use this good faith effort forced on citizens to pay to improve their communities for the benefit of wealthy corporations rather than economically disadvantaged citizens. Municipalities are acting in bad faith by misusing the blight doctrine.<sup>201</sup> This misuse suggests abuse of the legislature's intent to supply aid only for a dire need.<sup>202</sup>

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198. Tepper, *supra* note 24, at 36.

199. See Rogers, *supra* note 73, at 172 (stating that a strong objection to public subsidies for areas that are not dangerously blighted "is that it benefits an already privileged class—private developers—at the public's expense").

200. See Lefcoe, *supra* note 27, at 1005 (noting that property taxes are used to fund redevelopment).

201. See Kanner, *supra* note 22, at 89 (implying that urban government regularly abuses its power by seizing unoffending land to transfer to private developers at a subsidized price).

202. See Tepper, *supra* note 24, at 36 (noting the California state legislature's "growing concern over the proliferation of redevelopment projects in marginally blighted or nonblighted areas"). It seems apparent that this is an area where legislatures prefer that courts limit the potential for abuse, rather than exercise minimal review rationalized by deference for legislative objectives. Certainly legislators, acting as representatives of the public, do not want to bilk their constituents to line the pockets of wealthy, private developers.

Another commentator argues that the entire blight justification for private redevelopment is a sham, because developers would likely never be in the market for truly blighted land. Kanner, *supra* note 22, at 90-91.

[N]o rational redeveloper would be interested in investing in truly blighted land and building on it unless it is so located as to have a promising potential for profitable redevelopment. It is at best questionable whether land with such potential would remain in its "blighted" condition for very long if left to development or redevelopment by private market forces.

*Id.* Municipalities may be gambling with public financing for such redevelopment efforts, although they claim the possible profits will serve a public purpose. See *id.*

One method of reform would require heightened review of allegedly blighted conditions.<sup>203</sup> Another would require the existence of multiple conditions, rather than just one to define an area as blighted.<sup>204</sup> Given the broad range of conditions contemplated under blight definitions, one can easily envision a scenario where facts that could be construed to indicate one of the conditions could be exaggerated to label an entire area as blighted. For example, with proof of one building in need of paint, a city could construe an entire block as blighted. Currently, there are no limits to these broad concepts.<sup>205</sup> Under the existing deferential review exercised by courts, a municipality's opinion of blighted conditions or evidence of bad faith will not be thoroughly investigated.<sup>206</sup> This implicates significant potential for exploitation.

## 2. Future Blight is an Inadequate Basis for a Taking

While courts have been slow to respond to overuse of the blight definition, some have recognized the unjustifiably speculative nature of the possibility of future blight as a justification for redevelopment.<sup>207</sup> States like Minnesota that favor broad acceptance of condemnations for redevelopment

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Redevelopment is . . . a more effective and cheaper means of gaining title to land the redevelopers covet. The public thus winds up subsidizing private pursuit of profits, usually on the basis of optimistic . . . projections . . . that the community at large will benefit as the redevelopers grow rich. In fact, redevelopment projects . . . can be risky.

*Id.* at 91.

203. Such review could parallel strict scrutiny analysis described in *supra* Part II.B.3.

204. State blight statutes, such as MINN. STAT. ANN. § 469.002 subd. 11 (West 2001), only require the existence of one of the listed conditions to categorize an area as blighted. *See supra* note 29 and accompanying text.

205. Proponents of tax increment financing, which subsidizes acquisition and construction costs for redevelopment, acknowledge that while traditional indicators of blight may not exist in an area, they want to redevelop the property to achieve its "highest and best use." Rogers, *supra* note 73, at 162, 172 (citing Schultz & Sapp, *supra* note 181, at 27-28).

206. *See id.* at 169.

207. *See, e.g.*, 99 Cents Only Stores v. Lancaster Redevelopment Agency, No. CV 00-07572 SVW, 2001 WL 811056, at \*6 (C.D. Cal. June 26, 2001). The court characterized such an argument as completely speculative and without basis in California redevelopment law. *See id.*; *see also supra* note 62 and accompanying text. According to the court, the future blight rationale is an untenable position because if blight remains latent, no site could ever be truly free from it. *See 99 Cents Only Stores*, 2001 WL 811056, at \*6.

projects incorporate such speculative justifications as valid.<sup>208</sup> For example, the relevant Minnesota statute defines a redevelopment project as “any work or undertaking” to “acquire blighted areas *and other real property* for the purpose of removing, *preventing*, or reducing blight, blighting factors, or the causes of blight.”<sup>209</sup> This broad definition allows non-blighted real property to be redeveloped in the name of possibly preventing a cause of blight or blight factor.<sup>210</sup> The scope of this possibility is absurd. It opens the door for any municipality to argue that an area must be condemned simply because it is *possible* that it *could* become blighted in the future.<sup>211</sup> This type of legislation strips the Fifth Amendment’s due process protection of private property of any meaning.

#### D. HISTORIC PRESERVATION

Finally, a purely policy argument for reforming the blight doctrine concerns historic preservation.<sup>212</sup> The ease with which municipalities currently condemn properties as blighted reflects American society’s reputation as disposable; Americans tend to tear down and rebuild rather than restore or refurbish old buildings.<sup>213</sup> While there is no evidence that the auto dealerships and homes condemned in *Walser* had any remarkable architectural value to warrant their preservation, the concept of maintaining respect for existing structures is what is at issue. The Best Buy corporate headquarters will likely be more attractive than one of its big-box stores,<sup>214</sup> but will hardly be worth preserving years from now when Best Buy has no more use for the facility. The government’s failure to

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208. See *supra* notes 73-75 and accompanying text.

209. MINN. STAT. ANN. § 469.002, subd. 14(1) (West 2001) (emphasis added).

210. See *supra* note 205 and accompanying text.

211. See *supra* note 205 and accompanying text.

212. Federal regulations characterize “preservation” as “the act or process of applying measures . . . to sustain the existing form, integrity and materials of an historic property.” 36 C.F.R. § 68.2(a) (2001).

213. The National Register of Historic Places and federal legislation requiring federal agencies to take historic resources into account are examples of the effort to counter the depletion of historic buildings. See DANIEL R. MANDELKER & JOHN M. PAYNE, *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 789 (5th ed. 2001).

214. Best Buy is considered an extension of the big-box retailers, namely a “category-killer” retailer. Truitt, *supra* note 59, at 38. Its stores are not desirable neighbors, inviting the “not in my backyard” response by residents. *Id.* at 40.

archive the built environment for future generations is reflected in the current ease with which redevelopers obtain land through eminent domain.<sup>215</sup> Unfortunately, many redevelopers cut corners on building costs, creating facilities meant to last only a few decades.<sup>216</sup> While innovation is a trademark of American democracy, government must not ignore the value of preserving structures to safeguard a record of American history.

#### E. REQUIRE CORPORATIONS TO RETURN PART OF THE BENEFIT OF THE BARGAIN

Financing for redevelopment projects is another factor courts should consider when determining whether public benefits justify takings. While judges are not typically economists, and therefore cannot be expected to conduct in-depth financial analyses, they can perform some simple inquiries to provide reassurance that the takings are justified.<sup>217</sup>

##### 1. Courts Should Conduct a Cost-Benefit Analysis

The first inquiry would measure the costs of a proposed project versus the monetary benefits.<sup>218</sup> Costs paid by the

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215. *But see supra* notes 212-13 and accompanying text (evidencing legislative measures to preserve historic structures).

216. *Cf. Truitt, supra* note 59, at 40 (noting that communities are concerned about the tendency of big-box users to abandon their stores, leaving large, vacant buildings and deserted parking lots). *But cf. Larry Werner, When Boxes Die, Cities Get Creative*, STAR TRIB., Mar. 17, 2002, at D1 (describing creative ways to use abandoned big-box stores ranging from classroom space to a go-kart track).

217. Kulick, *supra* note 11, at 681.

218. Had the court in *Walser* undertaken this inquiry, it would have recognized that some of the drawbacks of the proposed project included increased traffic problems and the possible future consequence of sprawl. Forcing homeowners out of residential neighborhoods in first ring suburbs, which in the Twin Cities metro area approximate the crowded conditions of the city, requires them to move farther out, adding to the burden on infrastructure. *See Laurie Blake, Richfield May Face Traffic Challenges*, STAR TRIB., Feb. 3, 2000, at 2B (describing the congested traffic conditions along I-494 through the Twin Cities suburbs of Eden Prairie and Bloomington into first ring suburbs Edina and Richfield).

Other policy considerations include the detrimental impact to a well-established community and the resulting powerlessness citizens feel. From an urban planning perspective, big-box stores and corporate headquarters create a bleak environment unfriendly to pedestrians and citizen interaction in the community. *See Truitt, supra* note 59, at 40. Power centers housing big-box

municipality to acquire and alter infrastructure for the site should be weighed against the price paid by the corporation.<sup>219</sup> Additional effects such as detrimental impact on citizens and the community, as well as future consequences like sprawl, could also be considered to complete the analysis. A large discrepancy in this comparison could create a strong presumption that the taking is improper.<sup>220</sup>

If such a rudimentary analysis reveals an imbalance in favor of the private beneficiary, the project should be invalidated.<sup>221</sup> Because this Note argues that wealthy corporations should not be able to buy private property outside the open market by commandeering the government's eminent domain power, it seems inconsistent to argue that the private beneficiary should be able to entice the city with more dollars. A corporation should not be able to buy an unconstitutional taking of land. If cities insist on using a broad construction of public purpose, and courts continue to validate this construction,<sup>222</sup> standards must insure that the public receives its due benefit of the bargain. If courts insist that redevelopment and the resulting tax revenue is preferable, courts must insure that the public receives part of the profit that corporations will collect from the redevelopment scheme. In the alternative, stricter requirements about payment of just compensation by the private beneficiary might result in fewer condemnation abuses. If corporations were required to pay just compensation for a taking that is equal to the fair market value of the land, private entities would not save money by using the government's eminent domain power.<sup>223</sup> While corporations

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chain stores are characterized by "traffic . . . both from cars and from the trucks required to feed the retailing giants, and increased noise pollution, trash and visual blight." *Id.* While one could argue that the problem already existed in the traffic snarled Richfield neighborhood, the Best Buy headquarters will exacerbate this condition.

219. See Kulick, *supra* note 11, at 681.

220. See *id.* at 681-82.

221. See *id.* at 681-83.

222. See *supra* note 32 and accompanying text.

223. See Lazzarotti, *supra* note 10, at 72 (urging that compensation reform might have the effect of "minimizing the chance that a disproportionate burden will fall on the condemnee"). The author paints a bleak scenario of what could happen to an individual whose home is condemned after he or she has struggled to keep up with high mortgage payments. *Id.* The person might incur legal fees, moving expenses, and job search costs, causing her to struggle to make ends meet. *Id.* at 72-73. Currently, takings compensation does not include relocation costs. *Id.* at 72.

would obtain the benefit of buying attractive sites not for sale on the open market, the increased cost of litigating the condemnation or the harm to their reputations might not be worth the effort.<sup>224</sup> Raising the payment of just compensation to equitable, market levels, and requiring corporations to pay it, would stop enticements to avoid the open market.<sup>225</sup>

## 2. Financing Alternatives

Municipalities could use several methods to assure that the public benefits from the blight classification. At the outset, the practice cities use to pay corporations to take private property away from home and business owners for redevelopment projects should be invalidated.<sup>226</sup> This currently used method is wholly improper and strips public use of its intended meaning.

Second, as suggested above, corporations benefiting from redevelopment could pay the cost of the taking. A commonly voiced complaint is that the government “lowballs” property values when paying just compensation for a taking.<sup>227</sup> The downside of this proposal, however, is the appearance of impropriety when a corporation directly pays a property owner when she does not want to sell, but is forced to sell by the government. An objective market appraisal price paid by the developer, rather than the minimum paid by the government, would provide equitable monetary compensation.

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224. *See id.* at 73.

225. *See* Kulick, *supra* note 11, at 683-84.

226. The Best Buy project in the *Walser* case, for example, called for not only condemning a neighborhood and transferring the property to Best Buy, but the city also gave the company a forty-eight million dollar Tax Increment Financing (TIF) subsidy. Rochelle Olson, *Walser-Best Buy Suit Trial Begins*, STAR TRIB., Dec. 27, 2000, at B1. While it was too late to stop the condemnation, the Minnesota Court of Appeals later held that the use of TIF was invalid. *See supra* note 99 and accompanying text. *See also* Kanner, *supra* note 22, at 95 (arguing that “when a project fails to justify its cost, it should not be undertaken at all, rather then [sic] pursued by shortchanging property owners and denying them a fair measure of their constitutionally guaranteed just compensation”).

227. *Mississippi Churning*, *supra* note 109; *see also* Kanner, *supra* note 22, at 98-99 (arguing that “the most unjust aspect . . . is that . . . judges insist on awarding the same parsimonious measure of damages, whereby they consciously shortchange condemnees for a variety of losses indisputably suffered but said by judges to be noncompensable, even when they are readily compensable in other types of litigation”). Such losses include relocation costs and sentimental value that are not generally measured in just compensation. Lazzarotti, *supra* note 10, at 72.

Another suggestion contemplates writing a provision into the condemnation agreement that states if the private beneficiary profits from its venture, the city would receive a percentage of the profits for a fixed period of time. This would guarantee that the private benefit would not exploit the public medium it used to acquire profit. Finally, should the redeveloper's venture fail within a short period after acquiring the property,<sup>228</sup> the property should revert back to the city if it paid the initial bill. This time limit could be specifically set by statute, or could be defined as a reasonable period of time later determined by administrative or judicial review. Therefore, the developer could not abuse the public use doctrine and also acquire a windfall of the future market value of the site.

Additional benefits could result from increasing compensation from the bare minimum. Less litigation might result if property owners received adequate compensation.<sup>229</sup> While it is counter to the thesis of this Note to encourage respect for private property takings for private developers, if redevelopment projects must continue, just compensation at market value secures enduring treatment for condemnees.

Pro-development critics would likely counter that these proposals for increased financial accountability will cause corporations to give up on projects and go elsewhere, taking employment opportunities and tax bases with them.<sup>230</sup> This gloomy scenario assumes that corporations will find other municipalities with desirable sites and lenient public use standards. Uniformity is the key to a workable solution. If state legislatures require all municipalities to raise public use and financing standards to hold private beneficiaries accountable, then these private parties will not have the option to find another city to exploit. Profit-seeking corporations are not going to fold simply because they can no longer pilfer property through the government's eminent domain power. Corporations will be forced to find properties on the open market or comply with the higher standards.<sup>231</sup>

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228. See Truitt, *supra* note 59, at 40 (referencing as an example the closing of 110 KMart stores in 1994).

229. See Lazzarotti, *supra* note 10, at 73.

230. See Rogers, *supra* note 73, at 161 n.106 (mentioning the "fiscal well-being of the city" as a basis for a redevelopment project).

231. See Kulick, *supra* note 11, at 683-84 (discussing private market alternatives).



## CONCLUSION

The modern treatment of the public use requirement badly needs reform. If current trends continue, one can envision an urban landscape dominated by corporate headquarters and big-box chain stores, looming over their abutting blacktopped parking lots. Financially strapped municipalities run by politicians scared to impose unpopular tax hikes, will continue to seek corporate tax revenues. Private takings will continue unencumbered. Forced out of the urban core, homeowners will be required to move farther and farther out, inducing the inefficiencies of sprawl. While planning boards currently favor such redevelopment efforts as beneficial, the long-term implications are not so rosy.

Despite these dire predictions, reform is on the horizon. Judges are beginning to curtail the abuse of the public use doctrine. There is hope that the Supreme Court may revisit the area. The proliferation of takings benefiting private parties illustrates the urgent need to strictly construe the public use clause.

The approach advocated by this Note stresses the need for intensified judicial review of condemnation cases. Courts must intervene because current private-to-private takings abuses have to stop. Increased judicial vigilance is the solution to the current rift that takings abuses create between citizens and their municipal governments. This effort needs uniform implementation by legislatures and municipalities of stricter standards of scrutiny, including factors unique to public-to-private takings, due process, blight, and cost-benefit analyses. While costs to courts from engaging in such analyses may be high, such review is necessary to prevent abuses arising from the current framework. These increased costs and burdens will pay for themselves in the increased protection of private property rights.

Curtailing abuse through stricter review has the added benefit of preventing more takings that benefit private parties. These condemnations authorized for private parties via the government should be the exception and not the rule. Because so many of these condemnations currently stem from improper motivations, further review will curb their passage. Not only will this increased diligence by courts decrease the number of cases to review, but it will also restore meaning to the public use language of the Takings Clause.